**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **GERRY JOE MORGAN**<br>Claimant<br><br>VS.<br><br>**FANESTIL PACKING**<br>Respondent<br><br>AND<br><br>**MIDWESTERN INDEMNITY CO.**<br>Insurance Carrier | ) | Docket No. 1,033,978 |

## ORDER

Respondent and its insurance carrier (respondent) requested review of the May 25, 2007, preliminary hearing Order entered by Administrative Law Judge Brad E. Avery. Michael C. Helbert, of Emporia, Kansas, appeared for claimant. Thomas J. Walsh, of Roeland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant suffered an accidental injury that arose out of and in the course of his employment at respondent on February 28, 2007, and that he gave notice of his injury within 10 days. Even if claimant had not given such notice, the ALJ found that claimant had just cause for late notice since he feared he would lose his job because he had previous injuries. The ALJ ordered respondent to pay claimant temporary total disability compensation commencing March 1, 2007, until further order, until claimant is certified as having reached maximum medical improvement (MMI), or until claimant is released to a regular job or returned to gainful employment. Medical treatment was ordered with Dr. Amundson until further order or until certified as at MMI.

On appeal, the Board must consider only the record that was considered by the ALJ. In this case, that consists of those portions of the transcript of the May 18, 2007,

Preliminary Hearing and the exhibits that pertain to Docket No. 1,033,978, together with the pleadings contained in the administrative file.[1]

## ISSUES

Respondent argues that claimant failed to prove by a preponderance of the evidence that he sustained an injury by accident arising out of and in the course of his employment. Respondent further contends that claimant failed to provide timely notice of the alleged injury and that no just cause existed for claimant's failure to provide such timely notice.

Claimant argues that he met his burden of proving a work-related accident on February 28, 2007, as he was engaged in heavy physical labor, he hurt his back, he reported the injury to his superior, and he left work because of the injury. Claimant also contends he gave sufficient legal notice of his injury to respondent's general manager.

The issues for the Board's review are:

(1) Did claimant suffer an injury that arose out of and in the course of his employment at respondent?

(2) Did claimant give respondent notice of his alleged injury within 10 days?

(3) If not, does just cause exist to extend claimant's time to provide notice?

## FINDINGS OF FACT

Claimant has three workers compensation claims against respondent, one claiming a series to November 15, 2006 (1,033,976), another claiming a series to February 15,

[1] The preliminary hearing in this case was heard in conjunction with Docket No. 1,033,977. The exhibits offered in Docket No. 1,033,977 were incorporated into Docket No. 1,033,978 by agreement. In addition, the ALJ took "judicial notice" of the testimony taken in Docket No. 1,033,977 for purposes of Docket No. 1,033,978. P.H. Trans. at 96. Generally, as is the situation here, where there are multiple claims for accidents that involve the same parties, the same insurance carrier and the same attorneys, and especially those with overlapping accident dates, the claims will be consolidated for hearing. It is unclear from the record why the ALJ heard these claims together but then went out of his way to separate the two docketed claims. This is particularly puzzling because as soon as the testimony of each witness was taken in Docket No. 1,033,977, the ALJ proceeded to hear testimony from the same witnesses in Docket No. 1,033,978. The transcript of both proceedings is in one volume that contains the testimony and exhibits from both docketed claims, and the cover sheet bears both docket numbers. Nevertheless, because the ALJ heard the testimony separately and then issued separate orders and because the Application for Board Review bears only Docket No. 1,033,978, this appeal will be treated as only being from Docket No. 1,033,978.

2007, (Docket No. 1,033,977), and the third claiming a series to March 13, 2007[2] (Docket No. 1,033,978). A preliminary hearing was held in Docket Nos. 1,033,977 and 1,033,978 only on May 18, 2007. Separate orders were entered in Docket Nos. 1,033,977 and 1,033,978. Only the Order in Docket No. 1,033,978 was appealed. Although the Application for Hearing sets out the date of injury as a series to March 13, 2007, testimony of claimant and Terry Brown indicates that the injury in Docket No. 1,033,978 actually occurred on February 28, 2007, the last day claimant worked for respondent.

Claimant injured his back while working at respondent in July 2006. He reported this injury to the plant manager, Damon Clopton. Mr. Clopton sent claimant to see Dr. Detwiler. Later, claimant was directed by respondent to see Leighton York, a nurse practitioner. Claimant returned to work approximately a week later.

In January 2007, claimant began driving a truck for respondent. As part of this job, he was required to take a DOT physical. In doing so, he found out that he was showing blood in his urine, and he needed to complete some further testing. After that, he was returned to work in shipping.

On February 9, 2007, claimant was working in area known as the kitchen. He had been doing repetitive work on a stick dog machine. The machine made 14,000 corn dogs that day in less than eight hours, which required claimant to do a lot of twisting, bending and turning. He felt pain in his low back and reported it to Mr. Clopton. Mr. Clopton did not instruct him to see a particular physician or nurse practitioner. Claimant called in the next day he was scheduled to work and talked to Terry Brown. Mr. Brown also did not instruct him to see a particular doctor or nurse practitioner. Claimant was never asked to fill out an accident report.

Claimant continued off work. On February 15, 2007, he saw Sherry Smiley, a nurse practitioner, about the results of his urinalysis. He also complained to Ms. Smiley that he had low back pain on February 9 but had sat on a warm, vibrating pad and felt better until February 15. He complained to Ms. Smiley that he had bilateral flank pain. Ms. Smiley scheduled him for a follow-up urine culture and ordered an intravenous pyelogram to check for hematuris. Ms. Smiley gave claimant an off-work slip until Tuesday, February 20, for "back pain/illness."[3] Claimant told Mr. Brown about both his urinary problems and his low back problems after this visit with Ms. Smiley.

Claimant saw Ms. Smiley again on February 19, at which time he said he wanted to see a urologist for his problem with hematuria. Ms. Smiley referred him to Dr. Kosko and took him off work until February 22. Ms. Smiley told him to return to the clinic if his back pain persisted.

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[2] Form K-WC E-1, Application for Hearing (filed Apr. 4, 2007)

[3] P.H. Trans., Resp. Ex. A.

Claimant returned to work on February 22, 2007, after having been off since February 9, 2007, because of his alleged low back injury and possible kidney problem. He returned to work in the shipping area. In this area, he was required to load pallets and move product. He dealt with products that weighed from 10 pounds to 100 pounds. On February 28, 2007, claimant was in the freezer wrapping a pallet in plastic. He had made two or three wraps at the bottom when he twisted and turned as he stepped around a corner. When he pulled on the plastic, he felt like he was being stabbed in the back. The pain sent him down to his knee.

Claimant picked himself off the floor, picked up the roll of plastic, finished wrapping the pallet, and then left the freezer. He saw John Gibbs and slowly walked toward him, bent over. Mr. Gibbs asked him what was wrong, and claimant told Mr. Gibbs that he had hurt his back and was going to go home.

Terry Brown, respondent's general manager, asked claimant to come in to work the next day to clear up some confusion about what had happened the day before. Claimant went in and talked to Mr. Brown, explaining to him that he had been injured the day before while wrapping a pallet in the freezer. After this conversation, claimant was not instructed to fill out an accident report or to see a doctor. Mr. Brown denies that claimant told him he had been injured at work the day before while wrapping a pallet. Mr. Brown said that claimant told him that his lower back went out again, but he did not say when or where. If claimant had reported an accident, Mr. Brown would have filled out an accident report.

Claimant stated that Mr. Gibbs was a "blue hat" and he considered him a supervisor because he was telling claimant what to do. Mr. Brown testified, however, that Mr. Gibbs was a lead man and was not a supervisor, and injured employees are to report accident to supervisors. He admitted that as a lead man, Mr. Gibbs had the ability to assign jobs to "white hats" in his area. Mr. Gibbs would have the ability to correct an employee if that employee was doing something wrong. But he would not be able to discipline an employee if that employee continued doing something wrong. In that instance, Mr. Gibbs would have to get hold of a supervisor.

Claimant did not admit that Mr. Gibbs was a lead-man, and, as such, was just a coworker. Mr. Gibbs is deaf, but claimant stated that Mr. Gibbs has heard people talk before and is not completely deaf. Also, claimant stated that Mr. Gibbs can read lips. However, claimant admitted he knew on March 1 that there was some confusion about his leaving work on February 28, because he had been called in to work the next day to explain his leaving to Mr. Brown.

Mr. Brown admitted that on February 28 he knew that claimant had come in to work, that he worked a heavy labor job in shipping, and that claimant had reported to Mr. Gibbs that he had low back pain and left work. Mr. Brown knew the back problems had developed at work. Mr. Brown assumed that claimant was going to see a doctor. On February 28, claimant had only been working for a few days after having been away from

work on what Mr. Brown thought was a personal low back injury. Mr. Brown said that because claimant had a previous history of back problems, his back could have gone out at any time.

Since respondent did not authorize claimant to see a doctor, on March 5 claimant went on his own to Ms. Smiley. Ms. Smiley referred claimant to Dr. Sonya Sloan, an orthopedic surgeon. Claimant saw Dr. Sloan on March 13 and described to her his accident of February 28. Dr. Sloan suggested that claimant have an MRI, and this was done at Newman Hospital. The MRI revealed that he had a herniated disk at L4-5. Claimant saw Dr. Sloan again on March 21. Dr. Sloan's note of that date indicates that claimant "was very concerned that he should claim on work comp but felt that he may be fired thus chose not to at this time."[4] Claimant stated he did not recall specifically what he told Dr. Sloan but remembers telling her he was worried about his job because he had hurt his back in July 2006 and at that time had been threatened by respondent's owner with his job if he had back problems again.

Dr. Sloan gave claimant a slip on March 21 indicating that he should be off work for 30 days. That same day, claimant took this off-work slip and Dr. Sloan's medical note of the same date to Mr. Brown. The off-work slip did not indicate that claimant was to be off work because of a work injury. Even though Dr. Sloan's note mentioned that claimant was afraid to turn in a workers compensation claim, claimant was not authorized by respondent to see a doctor for this alleged work-related injury. He does not recall whether he had any further contact with respondent after this conversation with Mr. Brown on March 21.

Claimant admitted that as well as working for respondent, he ran a business where he detailed cars, trucks and bikes. A flyer he had posted advertising this business was entered as an exhibit. Mr. Brown testified that he was informed by a coworker, Gary Robertson, that Mr. Robertson observed claimant buffing down a car on March 18, 2007. On March 21, Mr. Brown asked claimant about the incident, and claimant told him that he was not bending over or picking up anything heavy. Mr. Brown made a written record of his conversation with claimant on March 21. That note set out claimant's comments about being seen buffing a car.

Mr. Brown's note of March 21 also indicates that he had told claimant to "come back and see me when he got released."[5] Claimant did not return after those 30 days to update Mr. Brown on his condition. The note does not indicate that claimant told Mr. Brown he had suffered a work-related injury on February 28, and Mr. Brown testified that claimant made no such assertion. Claimant does not remember Mr. Brown telling him to come back after his 30 days off work elapsed. On the date of the preliminary hearing, Mr. Brown had not seen claimant since March 21.

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[4] P.H. Trans., Cl. Ex. 1 at 1.

[5] P.H. Trans., Resp. Ex. H.

Claimant filed the three workers compensation claims on April 4, 2007.

Claimant was terminated for absenteeism on April 26, 2007. He had never received a warning as to his absenteeism, even though the company policy was that an employee was to receive a verbal warning the first time, a two-day suspension the second time , and termination after a third time. He was never offered light duty or accommodated work after his February 28, 2007, injury.

Claimant currently has sharp pains in his left hip down the buttock to his knee. He also has numbness in his left foot.

## PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[6] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[7]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[8]

K.S.A. 2006 Supp. 44-501(c) states in part: "The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability." It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an

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[6] K.S.A. 2005 Supp. 44-501(a).

[7] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[8] *Id.* at 278.

existing disease or intensifies the affliction.[9] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[10]

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 2006 Supp. 44-501(a) places the burden to prove personal injury by accident arising out of and in the course of employment and that he gave timely notice thereof:

> In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2006 Supp. 508(g) states: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

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[9] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

[10] *Hanson v. Logan U.S.D. 326*, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

In *Rash*,[11] the Kansas Court of Appeals stated: "In a workers compensation case, the burden of proof is on the claimant to establish the right to an award. [Citation omitted.] Once the claimant has met this burden, the respondent employer has the burden to demonstrate any exception."

Where respondent is asserting an intervening injury, it is respondent's burden to prove that the intervening injury was the cause of claimant's permanent impairment rather than the work-related injuries.[12]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[14]

## ANALYSIS

Claimant gave timely notice of his accident to Mr. Brown no later than March 1, 2007. Mr. Brown, respondent's general manager, said that he knew claimant left work on February 28 because his back had gone out. He knew claimant was performing heavy labor and that his back problem occurred at work. The fact that claimant had preexisting or prior back problems does not mean that Mr. Brown's knowledge was not sufficient notice of accident and injury. Mr. Brown was alerted to the problem, and he could have investigated further, authorized medical care, and had claimant complete an accident report form. The fact that Mr. Brown chose not to and, instead, relied on his belief that this was a non-compensable aggravation of a preexisting condition does not abrogate the notice.

Claimant suffered a back injury or aggravated a preexisting back condition while working on February 28, 2007. Respondent points to claimant's other job and subsequent activity buffing a car as evidence claimant was not injured on February 28, 2007, as alleged. Claimant denies performing any heavy labor or bending and twisting type activity after February 28 and specifically denies injuring himself doing car detailing. The ALJ observed the witnesses testify at the May 18, 2007, preliminary hearing, including claimant. The ALJ obviously found claimant's testimony to be credible because he awarded compensation. The Board generally gives some deference to an ALJ's assessment of

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[11] *Rash v. Heartland Cement Co.*, 37 Kan. App. 2d 175, 186, 154 P.3d 15 (2006).

[12] *Desautel v. Mobile Manor Inc.*, Nos. 262,971 & 262,972, 2002 WL 31103972 (Kan. WCAB Aug. 29, 2002), *cf. Palmer v. Lindberg Heat Treating*, 31 Kan. App. 2d 1, 4, 59 P.3d 352 (2002).

[13] K.S.A. 44-534a.

[14] K.S.A. 2006 Supp. 44-555c(k).

credibility when he has had the unique opportunity to view the in-person testimony of the witnesses. After reviewing the record, this Board Member finds it to be appropriate to give deference to the ALJ's findings as to credibility and agrees with the ALJ's conclusion that claimant has met his burden of proof.

## CONCLUSION

Claimant suffered personal injury to his back by accident arising out of and in the course of his employment with respondent on February 28, 2007. Furthermore, claimant gave timely notice of his accident to respondent.

## ORDER

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated May 25, 2007, is affirmed.

**IT IS SO ORDERED.**

Dated this _____ day of August, 2007.

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BOARD MEMBER

c: Michael C. Helbert, Attorney for Claimant
Thomas J. Walsh, Attorney for Respondent and its Insurance Carrier
Brad A. Avery, Administrative Law Judge